

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.HARIPRASAD

TUESDAY, THE 3RD DAY OF NOVEMBER 2015/12TH KARTHIKA, 1937

Bail Appl..No. 5660 of 2015

CRIME NO. NOT KNOWN
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PETITIONER(S)/A3:

**JAYACHANDRAN K.R. @ JAYACHANDRAN @
UNII @ CHANDRABABU @ MURINA,,
INDIAN NATIONAL, AGE 42, S/O.SH. KRISHNAN,
R/O. TC 78/723 (NEW) TC 42/1407, DWARAKA,
SANGAMAM NAGAR, VALLAKADAVU, THIRUVANANTHAPURAM-8.**

BY ADV. SRI.SASTHAMANGALAM S. AJITHKUMAR

RESPONDENT(S):

**THE INTELLIGENCE OFFICER,
NCB, NARCOTIC CONTROL BUREAU,
SUB ZONE KOCHI, REPRESENTED BY THE
SPECIAL PUBLIC PROSECUTOR,
NARCOTIC CONTROL BUREAU, ERNAKULAM - 682 031.**

BY ADV. SRI.M.V.S.NAMBOOTHIRY

**THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON
30-10-2015 THE COURT ON 03-11-2015, PASSED THE FOLLOWING:**

msv/

A.HARIPRASAD, J.

B.A. No.5660 of 2015

Dated this the 3rd day of November, 2015

ORDER

Bail application filed under Section 439 of the Code of Criminal Procedure (in short, "Cr.P.C.") by the third accused in S.C.No.728 of 2015 on the file of the Additional Sessions Judge-IV, Thiruvananthapuram, involved in O.R.No.4/NCB/SZ/COZ of Narcotics Control Bureau, Sub Zone, Cochin.

2. Petitioner along with other accused persons has been booked under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short, "NDPS Act") with the allegation that on 16.12.2014, accused 1 and 2 were apprehended at Kochuveli Railway Station, Thiruvananthapuram for possessing 0.395 kgs. heroin, a contraband article under the NDPS Act and they transported the contraband article to be handed over to the petitioner (third accused).

3. Heard the learned counsel for the petitioner and the learned Standing Counsel for Narcotics Control Bureau (NCB). I have carefully perused the case diary submitted.

4. The case arises out of a complaint filed by the Intelligence Officer, NCB. The allegations, in brief, in the complaint are the following: On 16.12.2014 at around 11.00 hours, the Intelligence Officer, NCB, Cochin received a telephonic information that one named person was likely to be in possession of around 400 grams of heroin (a narcotic drug) and he was about to deliver the same to another named person, a resident of Thiruvananthapuram, for further delivery to the petitioner. Identity of the person travelling in the train carrying the contraband was revealed. As instructed, the Officers waited at Kochuveli Railway Station for the arrival of the first accused. After he came out of the Railway Station, the second accused came on a motor bike and when they were about to leave the place, they were restrained and questioned. From them 0.395 kgs. of heroin was recovered. After complying with the formalities under the NDPS Act, they were taken into custody. It is further alleged that pursuant to the summons issued under Section 67 of the NDPS Act accused 1 and 2 voluntarily gave statements narrating the incidents and also implicating the petitioner in the crime.

5. The case diary contains the statements of accused 1 and 2 describing the sequence of events and the role played by them as well as the petitioner. Case diary statements also show that the petitioner refused to give a statement relating to the recovery.

6. Learned Standing Counsel for NCB contended that Section 37 of the NDPS Act places a restriction on the powers of this Court under Section 439 Cr.P.C. to grant bail in an offence under the NDPS Act, especially one relating to the possession of commercial quantity of any contraband article. Admittedly the contraband recovered from the direct possession of accused 1 and 2 is a commercial quantity. Section 37 of the NDPS Act reads as follows:

“37. Offences to be cognizable and non-bailable.-(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity shall be released on bail or on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail.”

7. Learned counsel for the petitioner contended that merely because two accused persons confessed their role and implicated another person in the crime, the personal liberty of the petitioner shall not be curtailed without any other material.

8. On going through the materials in the case diary, I am not impressed about this contention of the petitioner since accused 1 and 2 have narrated various instances in which they have supplied the contraband article to the third accused. Further, I do not find any specific suggestion from the petitioner to prima facie hold that this is a case of false implication.

9. Learned Standing Counsel for NCB contended on the basis of the decision in **Narcotics Control Bureau v. Kishan Lal (AIR 1991 SC 558)** that the High Court's power under Section 439 Cr.P.C. is subject to the limitations in Section 37 of the NDPS Act. The principle in the decision reads as follows:

“Section 37 as amended starts with a non-obstante clause stating that notwithstanding anything

contained in the Code of Criminal Procedure. 1973 no person accused of an offence prescribed therein shall be released on bail unless the conditions contained therein were satisfied. The NDPS Act is a special enactment and it was enacted with a view to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances. That being the underlying object and particularly when the provisions of S.37 of NDPS Act are in negative terms limiting the scope of the applicability of the provisions of Cr.P.C. regarding bail, it cannot be said that the High Court's powers to grant bail under S.439, Cr.P.C. are not subject to the limitation mentioned under S.37 of NDPS Act. The non obstante clause with which the Section starts should be given its due meaning and clearly it is intended to restrict the powers to grant bail. In case of inconsistency between S.439, Cr.P.C. and S.37 of the NDPS Act, S.37 prevails. The provisions of S.4, Cr.P.C. also make it clear that when there is a special enactment in force relating to the manner of investigation, enquiry or otherwise dealing with such offences, the other powers under Cr.P.C. should be subject to such special enactment. In interpreting the scope of such a statute the dominant purpose underlying the statute has to be borne in mind. Consequently the power to grant bail under any of the provisions of Cr.P.C. should necessarily be

subject to the conditions mentioned in S.37 of the NDPS Act.”

10. Learned Standing Counsel relying on the decision in **Union of India v. Rattan Malik ((2009) 2 SCC 624)** contended that apart from giving an opportunity to the Public Prosecutor to oppose the bail application as provided under Section 37(1)(b)(i) of the NDPS Act, the other twin conditions set out in Section 37(1)(b)(ii) have to be satisfied. The ratio reads as follows:

“It is plain from a bare reading of the non obstante clause in Section 37 of the NDPS Act and sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, but also subject to the restrictions placed by clause (b) of sub-section (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz; (i) the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. The conditions are cumulative and not alternative. The satisfaction

contemplated regarding the accused being not guilty, has to be based on "reasonable grounds". The expression "reasonable grounds" in Section 37 (1)(b)(ii) has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn, points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the NDPS Act."

11. On perusal of materials in the case diary, I am of the definite view that there are no reasonable grounds prima facie for holding that he is not guilty of any offence. Therefore, I do not find any reason to consider his plea for bail at this stage.

12. Learned counsel for the petitioner relying on the decision in **Supreme Court Legal Aid Committee representing undertrial prisoners v. Union of India ((1994) 6 SCC 731)** contended that the Supreme Court has laid down a proposition, considering the fact that the provisions for grant of bail under the Act are very strict, that those who languish in jail for a period exceeding half of the punishment provided

under the Act should be released on bail. Although the principle is unquestionable, the ratio in that case is inapplicable to this case considering the facts and circumstances. Therefore, I find no merit in the bail application. Hence it is dismissed.

A. HARIPRASAD, JUDGE.

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